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Hearing Date: May 19, 2021
Hearing Time: 10:00 a.m. (EST)
Objections Due: May 12, 2021
Objection Time: 4:00 p.m. (EST)

*Attorneys for Irving H. Picard, Trustee
for the Substantively Consolidated SIPA Liquidation
of Bernard L. Madoff Investment Securities LLC
and the chapter 7 estate of Bernard L. Madoff*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

In re:

BERNARD L. MADOFF,

Debtor.

Adv. Pro. No. 08-01789 (CGM)

SIPA LIQUIDATION

(Substantively Consolidated)

**TRUSTEE'S THIRTY-NINTH OMNIBUS MOTION
TO (I) DISALLOW CLAIMS AND OVERRULE OBJECTIONS OF CLAIMANTS WHO
HAVE NO NET EQUITY AND (II) OVERRULE OBJECTIONS OF CLAIMANTS WHO
INVESTED MORE THAN THEY WITHDREW**

Irving H. Picard, trustee ("Trustee") for the substantively consolidated liquidation of
Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor

Protection Act, 15 U.S.C. §§ 78aaa–lll, (“SIPA”),¹ and the chapter 7 estate of Bernard L. Madoff (“Madoff”) (collectively, the “Debtor”), by this combined motion and memorandum of law (the “Motion”), asks this Court to overrule objections to his claims determinations (the “Objections”) and affirm his denial of certain customer claims. The claims (“Claims”) at issue in this Motion were filed by customers that withdrew more money from BLMIS than they deposited and are thus, in the parlance of this case, net winners, and by customers that invested more money with BLMIS than they withdrew and are thus, in the parlance of this case, net losers (collectively, the “Claimants”). The Claims and the related Objections are listed in alphabetical order by the Claimant’s first name in the exhibits to Vineet Sehgal’s Declaration in Support of the Motion (the “Sehgal Declaration”). Fifteen net winner Claims and twelve related Objections are identified on Exhibit A to the Sehgal Declaration and two net loser Claims and two related Objections on Exhibit B.

PRELIMINARY STATEMENT

The Trustee determined the Claims by applying one or more of the methodologies for calculating net equity that have been approved by the courts during this SIPA liquidation. In the Objections, the Claimants contest the Trustee’s claims determinations on various legal grounds that have been uniformly rejected by the courts and resolved in the Trustee’s favor. Specifically, the Claimants make one or more of the following arguments: (i) the Trustee improperly determined net equity based on the cash in/cash out method (the “Net Investment Method”); (ii) the Trustee improperly determined the net equity of accounts that received one or more transfers from another BLMIS account (the “Inter-Account Method”); (iii) the Trustee should have made

¹ Subsequent references to SIPA shall omit “15 U.S.C.”

adjustments to net equity to account for the length of time Claimants were invested with BLMIS (the “Time-Based Damages Adjustment”); and (iv) the Trustee incorrectly treated profit withdrawal transactions (“PW Transactions”) reflected on the Claimants’ customer statements as debits for the purpose of determining net equity.

The courts have approved the Trustee’s use of the Net Investment Method, his rejection of a Time-Based Damages Adjustment, and the United States Supreme Court has declined to address these issues. In addition, the Second Circuit has validated the Inter-Account Method and recently affirmed the Trustee’s treatment of PW Transactions as withdrawals. Those decisions are final and no longer subject to appeal. Thus, the Claimants are not entitled to an adjustment to their net equity on any of these grounds.

Since his appointment, the Trustee and his professionals have continued to evaluate claims against BLMIS and objections to the Trustee’s claims determinations. In doing so, the Trustee evaluates whether particular claims and objections are ripe for final adjudication and whether any pending avoidance actions relate to those claimants. Here, the Trustee submits that the Claims and Objections are ripe for final adjudication. All the legal arguments raised in the Objections have been finally decided and there are no pending avoidance actions related to the Claimants. Therefore, the Trustee respectfully requests that the Court overrule the Objections and affirm his determinations of the Claims.

JURISDICTION

This Court has jurisdiction to consider this matter pursuant to SIPA §§ 78eee(b)(2) and 78eee(b)(4) and 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

BACKGROUND

1. The Commencement of the SIPA Proceeding

The basic facts of the BLMIS fraud are widely known and have been recounted in numerous decisions. *See, e.g., In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 231 (2d Cir. 2011); *In re Beacon Assocs. Litig.*, 745 F. Supp. 2d 386, 393–94 (S.D.N.Y. 2010). On December 11, 2008, the Securities and Exchange Commission (“SEC”) filed a complaint in the District Court against Madoff and BLMIS, captioned *SEC v. Madoff*, No. 1:08-cv-10791-LLS, 2008 WL 5197070 (S.D.N.Y. Dec. 11, 2008), alleging fraud through the investment advisor activities of BLMIS. The SEC consented to the consolidation of its case with an application of the Securities Investor Protection Corporation (“SIPC”). Thereafter, SIPC filed an application under SIPA § 78eee(a)(4) alleging that because of BLMIS’s insolvency, its customers needed SIPA protection. The District Court appointed the Trustee under SIPA § 78eee(b)(3) and removed the proceeding to this Court under SIPA § 78eee(b)(4).

2. The Trustee’s Role under SIPA

Under SIPA, the Trustee is responsible for, among other things, recovering and distributing customer property to a broker’s customers, assessing claims, and liquidating other assets of the firm for the benefit of the estate and its creditors. A SIPA trustee has the general powers of a bankruptcy trustee in addition to the powers granted by SIPA. SIPA § 78fff-1(a). In satisfying customer claims, the Trustee evaluates whether claimants are “customers,” as defined in SIPA § 78lll(2), who are entitled to share pro rata in “customer property,” defined in SIPA § 78lll(4), to the extent of their “net equity,” defined in SIPA § 78lll(11). For each customer with a valid net equity claim, SIPC advances funds to the SIPA trustee up to the amount of the customer’s net equity, not to exceed \$500,000 (the amount applicable to this case), if the

customer's share of customer property does not make her whole. SIPA § 78fff-3(a).

It is the customer's burden to demonstrate entitlement to customer status. *In re Bernard L. Madoff Inv. Sec. LLC*, 570 B.R. 477, 481 (Bankr. S.D.N.Y. 2017) (citing *Mishkin v. Siclari (In re Adler, Coleman Clearing Corp.)*, 277 B.R. 520, 557 (Bankr. S.D.N.Y. 2002) (“[I]t is well-established in the Second Circuit that a claimant bears the burden of proving that he or she is a ‘customer’ under SIPA.”)). The customer also bears the burden of proving the amount of his or her claim. *In re Bernard L. Madoff Inv. Sec. LLC*, 592 B.R. 513, 532 (Bankr. S.D.N.Y. 2018) (citing *Pitheckoff v. Sec. Inv'r Prot. Corp. (In re Great E. Sec., Inc.)*, No. 10 Civ. 8647 (CM), 2011 WL 1345152, at *4 (S.D.N.Y. Apr. 5, 2011)) *aff'd* 605 B.R. 570 (S.D.N.Y. 2019), *aff'd* 830 F. App'x 669 (2d Cir. 2020).

3. The Claims Process in the BLMIS Liquidation

On December 23, 2008, this Court entered a claims procedures order (the “Claims Procedure Order”), which approved (i) the form and manner of publication of the notice of the commencement of the liquidation proceeding and (ii) specified the procedures for filing, determining and adjudicating customer claims. (*See* ECF No. 12). BLMIS customers were directed to file their claims with the Trustee no later than six (6) months from the date the Trustee published notice of the commencement of the liquidation proceeding. *See* SIPA § 78fff-2(a)(3). After receiving a claim, the Trustee issued a determination letter to the claimant regarding the allowed amount of net equity. Claimants were permitted to object to the Trustee's determination of a claim by filing an objection in this Court, following which the Trustee requested a hearing date for the objection and notified the objecting claimant thereof.

Under the provisions of the Claims Procedure Order, the Trustee has successfully prosecuted numerous omnibus motions to affirm his claims determinations and overrule related

objections based on legal issues previously decided in his favor and many other motions to affirm his determinations that certain claimants should not be treated as “customers” under SIPA.

The Trustee has filed this Motion in accordance with the Claims Procedures Order to affirm his determinations of the Claims and overrule the Objections, which raise one or more of the legal issues identified below. The Claims and Objections are now ripe for final adjudication and there are no pending avoidance actions related to the Claimants.

RELIEF REQUESTED

By this Motion, the Trustee seeks the entry of an order affirming the Trustee’s determination of the Claims in accordance with the Net Investment and Inter-Account Methods, and without a Time-Based Damages Adjustment. The Trustee further seeks approval of his treatment of the PW Transactions reflected on the Claimants’ customer statements as debits for the purpose of determining the Claimants’ net equity. The Trustee respectfully requests that Court (i) disallow the Claims of the net winner Claimants identified on Exhibit A to the Sehgal Declaration; (ii) affirm the Trustee’s claims determinations of the Claims identified on Exhibits A and B to the Sehgal Declaration and (iii) overrule the Objections identified on Exhibits A and B to the Sehgal Declaration.

BASIS FOR RELIEF

1. The Net Investment Method

Pursuant to SIPA § 78fff(11), the term “net equity” means the:

dollar amount of the account or accounts of a customer, to be determined by – (A) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of such customer (other than customer name securities reclaimed by such customer); . . . minus (B) any indebtedness of such customer to the debtor on the filing date.

SIPA § 78fff-2(b) directs the Trustee to make payments to customers based on “net equity”

insofar as the amount owed to the customer is “ascertainable from the books and records of the debtor or [is] otherwise established to the satisfaction of the trustee.”

On this basis, the Trustee determined that net equity claims should be calculated according to the Net Investment Method. The Trustee calculated the amounts of money that customers deposited into their BLMIS accounts and subtracted any amounts they withdrew from their BLMIS accounts. Some claimants argued that the Trustee was instead required to calculate net equity using the amounts shown on their November 30, 2008 customer statements (the “Last Customer Statement Method”).

This Court rejected the Last Customer Statement Method and upheld the Trustee’s use of the Net Investment Method. *In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122, 134-35 (Bankr. S.D.N.Y. 2010). Pursuant to 28 U.S.C. § 158(d)(2), the Bankruptcy Court certified an immediate appeal of its decision, which the United States Court of Appeals for the Second Circuit granted. *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 234 (2d Cir. 2011). The Second Circuit subsequently affirmed the Bankruptcy Court’s decision. *Id.* at 235-36. Then, on June 25, 2012, the United States Supreme Court denied certiorari. *Velvel v. Picard*, 133 S. Ct. 25 (2012); *Ryan v. Picard*, 133 S. Ct. 24 (2012). Therefore, a final order upholding the Trustee’s use of the Net Investment Method has been issued.

2. The Inter-Account Method

An inter-account transfer is a transfer between BLMIS customer accounts in which no new funds entered or left BLMIS. BLMIS recorded a book entry to internally adjust the balances of those accounts, but because there was no actual movement of cash, these book entries did not reflect any transfers of cash. Rather, the inter-account transfers merely changed the reported value of the purported equity maintained in the accounts. Such transfers consisted of the

following: (i) all principal; (ii) all fictitious profits; or (iii) a combination of principal and fictitious profits.

To calculate the net equity for accounts with inter-account transfers, the Trustee calculated the actual amount of principal available in the transferor account at the time of the transfer and credited the transferee account up to that same amount. Consistent with the Net Investment Method, the Trustee did not include any fictitious gains in the net equity calculation. If the transferor account did not have any principal available at the time of the inter-account transfer, the transferee account was credited with \$0 for that transfer. Similarly, if the transferor account had principal available at the time of the inter-account transfer, the transferee account was credited with the amount of the inter-account transfer, to the extent of that principal.

Several claimants argued that the Trustee was instead required to credit inter-account transfers at their full, face value, as if actual money had been moved from one BLMIS account to another. In other words, these claimants argued that the Trustee should treat inter-account transfers as if they were external cash withdrawals by the transferor and external cash deposits by the transferee.

This Court approved the Trustee's use of the Inter-Account Method and held that "increasing [Claimants'] net equity claims by giving them credit for the fictitious profits 'transferred' into their accounts contravenes the *Net Equity Decision*." *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff)*, 522 B.R. 41, 47 (Bankr. S.D.N.Y. 2014). The Court explained:

[l]ike the Net Investment Method on which it is based [the Inter-Account Method] . . . ignores the imaginary, fictitious profits . . . and conserves the limited customer pool available to pay net equity claims on an equitable basis. . . . Crediting the Objecting Claimants with the fictitious profits . . . essentially applies the Last Statement Method to the transferors' accounts, and suffers from the same shortcomings noted in the *Net Equity Decision*. It turns Madoff's fiction into a

fact.

Id. at 53. Several claimants appealed and on January 14, 2016, the District Court issued its Opinion and Order affirming this Court's decision. The District Court held that the Inter-Account Method "is the only method of calculating net equity in the context of inter-account transfers that is consistent with the Second Circuit's *Net Equity Decision*, and that it is not prohibited by law." *In re Bernard L. Madoff Inv. Secs., LLC*, 2016 WL 183492, at *2 (S.D.N.Y. Jan. 14, 2016). Several claimants further appealed to the Second Circuit. The Second Circuit affirmed the District Court's decision, *Sagor v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, 697 F. App'x 708 (2d Cir. 2017), and no appeal was taken. Accordingly, the Second Circuit's decision stands as final.

3. Time-Based Damages Adjustment

Certain Claimants filed Objections seeking to adjust the Trustee's net equity calculation to allow for a Time-Based Damages Adjustment. Following the United States Supreme Court's decision denying certiorari on the Net Investment Method, the Trustee filed a motion to address objections that sought a Time-Based Damages Adjustment, arguing it is inconsistent with SIPA and therefore cannot be awarded. (*See* ECF No. 5038). In response, claimants raised numerous theories, all of which sought some increase in their customer claims based upon the amount of time they had invested with BLMIS. Most commonly, claimants relied on the New York prejudgment rate of 9% per annum, lost opportunity cost damages, or the consumer price index to take inflation into account.

The Bankruptcy Court ruled that, as a matter of law, SIPA does not permit the addition of time-based damages to net equity, and therefore upheld the Trustee's rejection of a Time-Based Damages Adjustment. *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 496 B.R. 744,

754-55 (Bankr. S.D.N.Y. 2013). Following its decision, the Bankruptcy Court then certified an immediate appeal pursuant to 28 U.S.C. § 158(d)(2), which the Second Circuit granted. *In re Bernard L. Madoff Inv. Sec. LLC*, 779 F.3d 74, 78-79 (2d Cir. 2015). The Second Circuit affirmed the Bankruptcy Court's decision, holding that SIPA did not permit a Time-Based Damages Adjustment to "net equity" claims for customer property. *Id.* at 83. The Second Circuit concluded that such an adjustment would have gone beyond the scope of SIPA's intended protections and was inconsistent with SIPA's statutory framework. *Id.* at 79.

On October 5, 2015, the United States Supreme Court denied certiorari, and thus a final order has been issued upholding the Trustee's rejection of a Time-Based Damages Adjustment. *Peshkin v. Picard*, 136 S. Ct. 218 (2015).

4. Profit Withdrawal Transactions

BLMIS fabricated stock transactions based on historical trading data to give the appearance of profitable trading activity. BLMIS employees would set up fictional "deals" in a particular stock and record the ostensible purchase of that stock on customer statements as a debit. At the conclusion of the deal period, the customer statements would show a purported sale of the stock and a corresponding credit for the sale price. The difference between the sale and purchase price for the deal stock would invariably show a "profit" for the associated BLMIS account.

Upon opening an account with BLMIS, certain customers would elect to have such "profits" sent to them at the conclusion of each deal. For customers that elected to be sent profits, BLMIS automatically sent a check in the amount of the fictitious profits. Profit withdrawals refer to these distributions of fictitious profits that BLMIS sent to its customers for the returns purportedly generated in their customer accounts as a result of fictitious trading activity. The

underlying PW Transactions were recorded on the BLMIS customers' monthly statements with a "PW" notation followed by the name of a publicly-traded corporation and a corresponding deduction from the account holders' equity balance.

Certain claimants objected to the Trustee's treatment of PW Transactions as cash withdrawals. Given the number of claimants whose accounts contain PW Transactions, Judge Bernstein established an omnibus proceeding to give all affected claimants the opportunity to brief the issue and conduct discovery (*See* ECF No. 10266) and conducted a trial of the objection of Aaron Blecker to the Trustee's determination of his claims. The claimants who chose to participate in the omnibus proceeding argued, among other things, that in the absence of any corroborating evidence by the Trustee, PW Transactions should be disregarded and net equity increased accordingly.

Following an evidentiary hearing, the Bankruptcy Court concluded that "PW Transactions listed in a customer's monthly statement supports the finding, absent credible contrary evidence, that a check in that amount was sent to the customer and constitutes a cash withdrawal under the Net Investment Method." *Bernard L. Madoff Inv. Sec. LLC*, 592 B.R. at 538. Based on the trial evidence, the Court found that Mr. Blecker had ratified BLMIS's treatment of the PW Transactions as debits to his accounts and had failed to sustain his burden in proving that his customer accounts had positive net equity. *Id.* at 531-32.² On appeal, the District Court affirmed the Bankruptcy Court's decision in all respects. *See Blecker v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, 605 B.R. 570 (S.D.N.Y. 2019). The Second Circuit also affirmed, *Blecker v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, 830 F. App'x 669 (2d Cir.

² The Court also determined that Mr. Blecker ratified the PW Transactions because he failed to object to the PW Transactions depicted on his monthly customer statements.

2020), and no further appeal was taken, rendering the Second Circuit's decision final.³

NOTICE

Notice of this Motion has been provided by U.S. mail, postage prepaid, or email to the following: (i) all Claimants listed on Exhibits A and B to the Sehgal Declaration (and their counsel) whose Objections are subject to this Motion; (ii) all parties included in the Master Service List as defined in the Order Establishing Notice Procedures (ECF No. 4560); (iii) all parties that have filed a notice of appearance in this case; (iv) the SEC; (v) the IRS; (vi) the United States Attorney for the Southern District of New York; and (vii) SIPC, pursuant to the Order Establishing Notice Procedures (ECF No. 4560). The Trustee submits that no other or further notice is required. In addition, the Motion and related pleadings will be posted to the Trustee's website www.madofftrustee.com and are accessible, without charge, from that site.

No previous request for the relief sought herein has been made by the Trustee to this or any other Court.

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³ The deadline to file a petition for writ of certiorari has expired. *See* 28 U.S.C. §§ 1254, 2101(c).

CONCLUSION

For the reasons stated, the Trustee respectfully requests that the Court enter an order (i) disallowing the Claims of the net winner Claimants identified on Exhibit A to the Sehgal Declaration, (ii) affirming the Trustee's claims determinations of the Claims identified on Exhibits A and B to the Sehgal Declaration, (iii) overruling the Objections identified on Exhibits A and B to the Sehgal Declaration, and (iv) granting such other and further relief as is just.

Dated: New York, New York
April 15, 2021

Respectfully submitted,

/s/ David J. Sheehan

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